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Dec 16 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
The Honorable George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2024-000470

J'QUAN MARQUEL SCOTT,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES PRESENTED

I. Did the PCR judge err in refusing to find plea counsel ineffective for failing to move for recusal of the judge who accepted the guilty plea and sentenced Petitioner to life in prison when the record shows bias or prejudice on the part of the judge against plea counsel?

RESPONDENT'S STATEMENT OF ISSUES PRESENTED

I. Whether the PCR court correctly found that Counsel was not constitutionally ineffective for failing to move for recusal of the plea judge where no meritorious reason existed that required the plea judge's recusal and where Petitioner has failed to prove he was prejudiced by this alleged failure.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. In December 2013, the Charleston County Grand Jury indicted Petitioner for murder (2013-GS-10-07416), armed robbery (2013-GS-10-07418), kidnapping (2013-GS-10-07419), and possession of a firearm during the commission of a violent crime (2013-GS-10-07421). James Brown, Esquire ("Counsel") represented Petitioner at his plea. Solicitor Scarlett Wilson prosecuted the case. On August 26, 2015, Petitioner pleaded guilty before the Honorable Kristi L. Harrington. Judge Harrington sentenced Petitioner to life imprisonment for murder, thirty years for armed robbery, thirty years for kidnapping, and five years for possession of a weapons during the commission of a violent crime.

Petitioner filed a timely notice of appeal. Laura M. Caudy, Esquire, of the Office of Appellate Defense perfected the appeal. Appellate counsel filed an Ander's Brief of Appellant on February 16, 2017. The Court of Appeals directed appellate counsel to brief further issues on December 15, 2017. The remittitur was returned to the circuit court on November 5, 2018.

On October 17, 2019, Petitioner filed an application for post-conviction relief. Respondent made its return on or about February 14, 2020. An evidentiary hearing was convened on February 6, 2023, at the Charleston County Courthouse. Petitioner was present at the hearing and was represented by James K. Falk, Esquire. Respondent was represented by Assistant Attorney General T. Cruise Mitchell, of the South Carolina Attorney General's Office. In an order filed March 23, 2024, the Honorable George M. McFaddin, Jr. vacated Petitioner's kidnapping sentence and denied Petitioner's remaining application for post-conviction relief. This appeal follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.; Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

II. The PCR court correctly found that Counsel was not constitutionally ineffective for failing to move for recusal of the plea judge where no meritorious reason existed that required the plea judge's recusal and where Petitioner has failed to prove he was prejudiced by this alleged failure.

Petitioner alleges the PCR court erred in finding plea counsel was not ineffective for failing to move for recusal of the plea judge when the record shows bias or prejudice on the part of the judge against plea counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR Petitioner alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the Petitioner must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670. The Petitioner bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

This Court should deny the petition for writ of certiorari because the PCR court correctly found Counsel was not deficient for failing to move for the recusal of the plea judge. First, Petitioner has wholly failed to demonstrate bias or prejudice existed that would have required the plea judge to recuse herself. Petitioner contends that because the plea judge threatened to hold Counsel in contempt, this created a bias which would have required her recusal. This argument is without merit.

"The power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once became possessed of the power." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795, 107 S. Ct. 2124, 2131, 95 L. Ed. 2d 740 (1987) (quoting *Michaelson v. United States ex rel. Chicago, St. P., M., & O.R. Co.*, 266 U.S. 42, 65–66, 45 S. Ct. 18, 19–20 (1924)); see also *State v. Havelka*, 285 S.C. 388, 330 S.E.2d 288 (1985) ("Power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings…").

Petitioner is in effect arguing that if a judge exercises an inherent authority that is essential to the administration of justice, this will automatically create a bias that allows the

contempted party the ability to force a recusal of the presiding judge. If this court were to accept Petitioner's rationale, all a party who believes they will benefit from a different presiding judge need do is to create a situation in which they will be held in contempt, or merely threatened with contempt, to create a bias which forces that judge's recusal. This would create disorder in the courts of which is exactly what the power of contempt was designed to prevent—the preservation of order in judicial proceedings.

Respondent can find no authority in any jurisdiction in the United States, nor does Petitioner offer any, which stands for the proposition that a judge must recuse himself/herself if he/she threatens a party with contempt; and if the attorney then fails to request recusal on that basis, he is constitutionally ineffective. Thus, Counsel was not ineffective for failing to move for the recusal of the plea judge on this basis.

Additionally, Petitioner has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [her] case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*). "[W]hen Counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010). At the evidentiary hearing, the following exchange occurred:

> Q. Was there a strategic reason why you didn't ask for motion for recusal?
>
> A. I don't know if it was strategic, I've got to be honest with you, and - - and you and I did speak about this on Friday. You know, if you move to recuse, it's kind of like the proverbial taking a shot at the king and missing. They're not well received. I've actually never moved for a judge to recuse themselves ever, but I don't know that in that short time frame that there was a deliberate process about that. So I don't - - I don't know that I actually reflected on it, recusing her, because it was just a moment - - a matter of moments beforehand.

(App'x p. 250).

Counsel's explanation that he did not move to recuse the plea judge because recusal motions are not well received and there is a risk of further antagonization is a valid reason for not moving for recusal. Additionally, Counsel raised this issue following Petitioner's sentencing at the guilty plea hearing:

> Mr. Brown: Yes, maam. Thank you, and may it please the Court?
>
> Primarily, I guess, the issues are that today twice in Chambers and before sentencing there was chastisement of me be Your Honor, and it put me in an awkward situation, because if I come in and say that I ask you to recuse yourself because I may have done something to anger you - - and again I'm not implying that it was Your Honor that did anything.
>
> But it would put me in an awkward situation because if you denied recusal then that would just add insult to injury, and, on the other hand, if I don't do it and I'm looking in the rear view mirror by saying...
>
> The Court: Mr. Brown, after spending eleven hours or six hours on some issues, you never once let me know you were even thinking about asking me to recuse myself.
>
> Mr. Brown: That's because **I didn't think that it was in my interest or in my client's interest.**
>
> We had folks who had taken two days off and traveled from out of State to come here. Quite frankly, I didn't think it would happen, and I thought if I made the motion it would just add insult to injury.
>
> We have assembled today the equipment and the folks who have traveled and took days off to come here. I didn't think it would happen, and I have never seen a recusal be granted in nineteen years personally, although I've heard of it.

(App'x. pp. 98–99) (emphasis added).

The record clearly corroborates Counsel's testimony at the evidentiary hearing that he had a valid reason for not requesting the plea judge recuse herself—Counsel believed the motion would not be in his client's best interest and the likelihood of the motion being granted was low. Furthermore, Counsel raised this precise issue in his motion to reconsider which was denied by the plea judge. (App'x. p. 122–127). Counsel's decision to raise this issue in a motion to reconsider rather than a motion for recusal was a reasonable strategy. Thus, Counsel was not deficient for failing to move for the recusal of the plea judge.

Furthermore, Petitioner has failed to prove he was prejudiced by Counsel's alleged deficiency. The fact that the plea judge denied Counsel's Motion to Reconsider based on the exact same argument outlined in the Petition is strong evidence she would not have recused herself had Counsel made that motion. Additionally, no meritorious reason existed to require the plea judge to recuse herself. "Pursuant to Canon 3(E)(10(a) of Rule 501, SCAR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." *State v. Jackson*, 353 S.C. 625, 578 S.E.2d 744, 745 (Ct. App. 2003). "It is not enough for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice." *Id.* (citing *Roche v. Young Bros, Inc., of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998). "The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge." *Id.* (citing *Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984). The record evinces that the plea judge did not sentence Petitioner to life without parole based on anything other than information she learned from her participation in this case:

> The Court: I hope you are not thinking that your client received life because you did not bring the proper equipment.
>
> Mr. Brown: What is clear to me is that I did not make the motion. If I had thought it would be successful I would have, Your Honor.

(App'x. p. 106).

The record clearly refutes Petitioner's assertion that his sentence was based on something other than the record and facts of Petitioner's case. Furthermore, as stated above, a plea judge merely threatening an attorney with contempt does not require the judge's subsequent recusal.

Thus, Petitioner was not prejudiced since no meritorious reason existed which required the plea judge's recusal.

Additionally, Counsel was not deprived of any opportunity to present his lengthy mitigation presentation, including his PowerPoint. (App'x. pp. 60–71). His work was even commended by the plea judge during Petitioner's sentencing:

> The Court: This was a very difficult case, and I understand why you were advocating strongly for your client. I have never seen that many people say such complimentary things about others.
>
> I understand, Mr. Brown, and I understand that tempers or things may have been perceived as to what you were accomplishing, but I do believe from what I saw and heard that your client got more than generous representation on behalf of you and the individuals who were here.
>
> Thank you, again.

(App'x. p. 108).

Furthermore, it is purely speculative that a different judge would have sentenced Petitioner to anything less than life without parole had the plea judge recused herself. At the evidentiary hearing, Solicitor Scarlett Wilson testified that, at the time of the plea, she was very clear the State would be recommending a life sentence. (App'x. p. 258). The record of Petitioner's guilty plea corroborates that the State was recommending a sentence of life without parole, and Petitioner affirmed on the record he understood he could be sentenced to life if he pleaded guilty. (App'x. p. 32, ll. 8–12; p. 33, ll. 14–23). "Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). Petitioner was aware the State was recommending a life sentence and that it was within the court's discretion to sentence him to life without parole. Thus, Petitioner has failed to prove he was prejudiced.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari, as the post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issue raised.

Respectfully submitted,

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